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STUDY 1215

U.S. DEPARTMENT OF JUSTICE  
FEDERAL BUREAU OF INVESTIGATION  
WASHINGTON, D. C. 20535

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# **In the Supreme Court of the United States**

OCTOBER TERM, 1950

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No. 393

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

DENVER BUILDING AND CONSTRUCTION TRADES  
COUNCIL; INTERNATIONAL BROTHERHOOD OF  
ELECTRICAL WORKERS, A. F. OF L., LOCAL 68;  
AND UNITED ASSOCIATION OF JOURNEYMEN AND  
APPRENTICES OF THE PLUMBING AND PIPE  
FITTING INDUSTRY OF THE UNITED STATES AND  
CANADA, A. F. L., LOCAL NO. 3

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*ON WRIT OF CERTIORARI TO THE UNITED STATES  
COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA  
CIRCUIT*

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BRIEF FOR THE NATIONAL LABOR RELATIONS  
BOARD

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OPINIONS BELOW

The opinion of the Court of Appeals (R. 265-281) is not yet officially reported. The findings of fact, conclusions of law, and order of the National Labor Relations Board (R. 256-263, 211-247) are reported at 82 NLRB 1195.

## JURISDICTION

The judgment of the Court of Appeals was entered on September 1, 1950 (R. 282). The petition for a writ of certiorari was granted on December 11, 1950. The jurisdiction of this Court is invoked under 28 U. S. C., Section 1254, and Section 10 (e) of the National Labor Relations Act, as amended.

## QUESTION PRESENTED

A union was engaged in a dispute with a non-union subcontractor. Because the latter and his employees were working there, unions picketed at the situs of a construction project. The picketing was designed to induce employees of the general contractor and other subcontractors to cease work on the project, and thus to exert pressure on the general contractor to stop doing business with the non-union subcontractor on the project. The question presented is whether by such picketing the unions violated Section 8 (b) (4) (A) of the Act.<sup>1</sup>

<sup>1</sup> Respondents, in their memorandum in response to the petition for certiorari, stated that if the petition were granted, they proposed to argue that the judgment below should be sustained upon either or both of two additional grounds, which were rejected by the court below. These are: (1) The unfair labor practices did not affect commerce within the meaning of the Act; (2) The judgment of the United States District Court for the District of Colorado dismissing the interlocutory injunction proceedings brought on behalf of the Board pursuant to Section 10 (1) of the Act against respondents on the ground that the alleged unfair labor practices did not affect commerce within the meaning of the Act was *res judicata* on the question of the Board's jurisdiction in the instant unfair labor practice proceeding before the Board.

The commerce issue, which was dealt with fully by the court below (R. 267-270), is discussed generally in our brief in the *Watson* case, No. 85, this Term, and the application of the

## STATUTE INVOLVED

The pertinent provisions of the National Labor Relations Act, as amended (61 Stat. 136, 29 U. S. C., Supp. III, 141, *et seq.*), are set forth in the Appendix, *infra*, pp. 68-69.

## STATEMENT

I. The Board's Findings of Fact

Upon the usual proceedings under Section 10 of the amended Act, the Board, on April 13, 1949, issued its findings of fact, conclusions of law and order (R. 256-263, 211-247). Briefly, in pertinent part, the Board found that the respondent labor organizations violated Section 8(b) (4) (A) of the Act by picketing a building being erected by Doose

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governing principles to the facts of the instant case is treated therein.

We believe the second contention to be without merit not only for the reasons stated by the court below (R. 270-272), which we adopt herein by reference, but also because the doctrine of *res judicata* is inapplicable by reason of lack of identity of the causes of action. The relief contemplated in Section 10(1) is in the nature of an interlocutory injunction. The district court is not called upon to decide whether unfair labor practices affecting commerce have been committed, but merely whether there is reasonable cause to believe that they have. The ultimate determination of the truth of the charges and the existence of a violation is reserved exclusively to the Board in proceedings before it under Section 10 (b) and (c) subject to review by the courts of appeals. *Shore v. Building & Construction Trades Council*, 173 F. 2d 678 (C.A. 3); *Douds v. Local 294, Etc.*, 75 F. Supp. 414 (N. D. N. Y.); *Evans v. International Typographical Union*, 76 F. Supp. 881 (S. D. Ind.); *Styles v. Local 74, United Brotherhood of Carpenters, Etc.*, 74 F. Supp. 499 (E. D. Tenn.); *Douds v. Wine, Liquor & Distillery Workers Union, Local No. 1*, 75 F. Supp. 447 (S. D. N. Y.). That "identity of the causes of action" in the two proceedings, which is an essential element of the doctrine of *res judicata*, is therefore missing here. *Angel v. Bullington*, 330 U. S. 183, 186.

& Lintner, a general contractor, thereby causing members of local unions affiliated with the respondent Council to cease work on that project, with an object of forcing Doose & Lintner to cease doing business with Gould & Preisner, a non-union subcontractor who was employed on the building project. The Board's subsidiary findings and the supporting evidence may be summarized as follows:<sup>14</sup>

The Denver Building and Construction Trades Council, hereinafter called the Council, is a labor organization composed of delegates from the various local labor unions whose members are engaged in building and construction work in Denver, Colorado, and vicinity. The Council is engaged in representing and protecting the interests of its constituent unions and their members (R. 220; 22, 29). Among the craft unions affiliated with the Council are the United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry, Inc., Local No. 3, hereinafter called the Plumbers, and the International Brotherhood of Electrical Workers, A. F. of L., Local 68, hereinafter called the Electricians (*ibid.*).

Gould & Preisner is a partnership composed of Earl C. Gould and John C. Preisner (R. 216; 22, 29, 54-55). For approximately 20 years the firm

<sup>14</sup> In the following statement, whenever a semicolon appears, record references preceding the semicolon are to the Board's findings; succeeding references are to the supporting evidence.

has been engaged in electrical contracting work in connection with residential, commercial and industrial construction projects in Denver, Colorado (*ibid.*). In the course of its operations Gould & Preisner purchases various materials including copper wire, electric metallic tubing, conduits, steel boxes, panels, switches, and plugs. In 1947, the firm purchased raw materials valued at \$86,500 of which approximately 65 percent, or \$55,745, was purchased directly from more than forty firms located outside of the State of Colorado. Of the materials purchased locally in Colorado, practically all were produced outside of Colorado and then resold to Gould & Preisner (R. 216-217; 55-56).

Among the customers of Gould & Preisner are several firms which are engaged in interstate commerce. During 1946 and 1947, for example, Gould & Preisner performed work for such firms ranging in value from \$1,024 to \$7,467. (R. 217; 58-60, 171).

At the time of the hearing before the Board's Trial Examiner, Gould & Preisner had 28 employees (R. 216; 55). The firm has operated as a non-union shop (R. 220; 91). As a consequence, it has been involved in a long-standing labor dispute with the Council and some of its affiliates, particularly the Electricians, and for many years the firm has been listed as "unfair" by the Council (R. 220-221; 132).

In September 1947, Gould & Preisner entered into arrangements with Doose & Lintner, a part-

nership engaged in the general building construction business in Denver, to perform for a price estimated at \$2,300, certain electrical work, including the furnishing of materials on a commercial building being erected by Doose & Lintner, on Bannock Street in Denver.<sup>2</sup> Doose & Lintner also entered into arrangements with other contractors to perform essential work on that building. Gould & Preisner began work on the Bannock Street building late in October 1947 (R. 227; 60-61). Its employees were the only non-union employees working on the building. The others, including plumbers, laborers and carpenters, employed by Doose & Lintner and various subcontractors engaged on the job were members of unions affiliated with the Council (R. 230-231; 91, 114-115).

In November 1947, and again about a month later, Jack Fisher, an assistant business agent of the Electricians, met Earl Gould, a partner in Gould & Preisner, and after pointing out to him that his firm's employees were the only non-union men working on the Bannock Street job, said that he did not see how it could progress with them working on that job. Gould insisted that they would complete their work pursuant to their con-

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<sup>2</sup> As hereinafter noted, Doose & Lintner terminated the services of Gould & Preisner before completion of the work undertaken by the latter; at the time its services were terminated, Gould & Preisner had spent \$348.55 for materials used by it on the project. The record does not disclose what percentage, if any, of these materials came from out-of-state sources (R. 218; 175).

tract unless they were "bodily put off." Fisher replied that the situation would be difficult for both Gould & Preisner and Doose & Lintner (R. 228; 63-64).

On January 8, 1948, a representative of the Electricians reported to the Council's business representative, Clifford Goold,<sup>3</sup> that the services of Gould & Preisner were being used by Doose & Lintner on the Bannock Street job. That same day, the Council's Board of Business Agents held a meeting attended by a majority of the business agents of various craft unions affiliated with the Council, including Clyde Williams and Jack Fisher, agents of the Electricians, and Mike McDonough, an agent of the Plumbers. At this meeting it was decided, and business representative Goold of the Council was instructed, "to place a picket on the Bannock Street job stating that the job was unfair" to the Council. In keeping with the Council's practice, each organization affiliated with it was furnished with a copy of the minutes of that meeting, which noted the decision to picket Doose & Lintner's Bannock Street job (R. 228-229; 129-131, 132-133). The Council's action was taken pursuant to its bylaws.<sup>4</sup>

<sup>3</sup> This individual is to be distinguished from Earl Gould, a partner in Gould & Preisner.

<sup>4</sup> These bylaws provide, in part, as follows (R. 237-238; 185-186):

#### ARTICLE 1-B

Section 2. The Board of Business Agents, by majority, vote at any regular meeting, shall have the power to

Shortly after this action was taken, Clifford Goold, Fisher, and McDonough visited the Bannock Street job, where they conferred with Lintner, Doose and Earl Gould. Clifford Goold and Fisher reminded Lintner that Gould & Preisner was non-union, and that union men could not work on the job with non-union men. Goold also told Lintner that if Gould & Preisner worked on the job, the Council and its affiliates would have to put a picket on it to notify their members that non-union men were working on the job and that the

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declare a job unfair and remove all men from the job. They shall also have the power to place the men back on the job when satisfactory arrangements have been made.

Section 3. Any craft refusing to leave a job which has been declared unfair or returning to the job before being ordered back by the Council or its Board of Agents shall be tried, and if found guilty, shall be fined the sum of \$25.00.

\* \* \* \* \*

## ARTICLE XI-B

\* \* \* \* \*

Section 2. The representative of the Council shall have the power to order all strikes when instructed to do so by the Council or Board of Agents. Any member of an affiliated craft who refuses to stop work when ordered to do so by the Council or Board of Agents, shall be reported for action in the Council. All employees on a struck job shall leave the same when ordered to do so by the Council Agent and remain away from the same until such time as a settlement is made, or otherwise ordered.

job was "unfair." McDonough advised Doose that if he [McDonough] were a contractor "he probably could get rid of Gould & Preisner." Fisher and McDonough informed Gould and Lintner that the Bannock Street job was "too big a job" for the unions to permit non-union electricians to work on it. Gould insisted on completing the job, and McDonough and the Council's representative, Goold, then told Lintner, Doose and Gould that there would be a picket on the job; and that union men, knowing that union bylaws bar union men from working on a picketed job, would leave the job (R. 229-230; 90-91, 112-114, 116-117).

On January 9, the Council's business representative, Clifford Goold, posted a picket on the Bannock Street job carrying a placard reading, "This job unfair to Denver Building and Construction Trades Council." The picket was paid by the Council. The picketing continued from January 9th through January 22, 1948. During this two-week period, no union employees worked on the building; the only employees who reported for work were the non-union electricians of Gould & Preisner (R. 230-231; 29, 65, 92, 93-95, 131-132).<sup>5</sup>

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<sup>5</sup> When the picketing began, there were some union laborers and plumbers at work. The union plumbers, on observing the picket line, when they reported for work, picked up their tools and left. The laborers also quit work. The union carpenters had been removed just prior to the picketing in anticipation of it and transferred by Doose & Lintner to another project where construction work continued without interruption during the picketing of the Bannock Street project (R. 230, 258; 94-95, 114-115).

On January 22, before Gould & Preisner had completed its work on the project, Lintner telephoned Preisner and told him that he "would have to get off the job, so he [Lintner] could continue with his project." On the same day, Doose & Lintner, after first showing it to Clifford Gould of the Council, mailed a letter to Gould & Preisner, notifying the latter that its services were being terminated on the Bannock Street job because "your employees are unable to perform services while the employees of other subcontractors are working on the premises" (R. 231; 121-122, 93-94, 181).

On the following day, January 23, the Council removed its picket and shortly thereafter the union employees resumed work on the Bannock Street project. Although Gould & Preisner wrote to Doose & Lintner on January 24 protesting the treatment which it was receiving, its electricians were denied entrance to the Bannock Street job, and thereafter performed no work on that project. (R. 232; 82, 95, 182).

## *II. The Board's Conclusions and Order*

On the basis of the foregoing facts, the Board found (R. 258) that the Council and its affiliates, the Electricians and Plumbers, by picketing Doose & Lintner's Bannock Street project and thereby causing members of the local unions affiliated with the Council employed by Doose & Lintner and others to stop working on that job, engaged in, and

induced and encouraged these employees to engage in, a strike or concerted refusal to perform services in the course of their employment. The Board further found (*ibid.*) that an object of this strike action was to force or require Doose & Lintner to cease doing business with Gould & Preisner. The Board, accordingly, concluded that the Council, the Electricians and the Plumbers had engaged in strike action prohibited by Section 8 (b) (4) (A) of the Act.

The Board ordered (R. 260-261) the Council and its two affiliates to cease and desist from engaging in, or inducing or encouraging the employees of Doose & Lintner or any other employer to engage in, a strike or concerted refusal in the course of their employment to use, manufacture, process, transport, or otherwise handle or work on any goods, articles, materials, or commodities, or to perform any services, where an object thereof is to force or require Doose & Lintner or any other employer or other person to cease doing business with Gould & Preisner.

### III. *The Decision Below*

The court below on September 1, 1950, handed down its opinion and judgment denying enforcement of the Board's order. The court held, in accordance with the Board's view (see Brief for the National Labor Relations Board in *National Labor Relations Board v. International Rice Milling Com-*

pany, No. 313, this Term, pp. 7-10) that the provisions of Section 8 (b) (4) (A) of the Act, insofar as here pertinent, are directed against secondary boycotts but are not directed against primary strike action. The court, however, gave broader scope to the concept of primary strike action than did the Board. The court stated that the "usual secondary boycott or strike is against one who is not a party to the original dispute. It is designed to cause a neutral to cease doing business with, or to bring pressure upon, the one with whom labor has a dispute. It seeks to enlist this outside influence to force an employer to make peace with the employees or labor organization contesting with him." The court held that the strike engaged in here was primary and not secondary in this "usual" sense, and that it was therefore outside the ban of Section 8 (b) (4) (A). In support of this conclusion, the court stated as follows (R. 277, 279):

The picketing and resulting strike were at the premises of the contractor where the subcontractor's men were at work. It grew out of a controversy over the conduct of the contractor in participating in the bringing of the non-union men onto the job as well as over the conduct of the electrical subcontractor in employing them. The purpose of the Council was to render the particular job all union. It was not to require Gould & Preisner to unionize their shop located elsewhere or to bring pressure against Doose & Lintner at any other

place because of the employment of Gould & Preisner at Bannock Street. Accordingly, the object was not in any literal sense to require Doose & Lintner to cease doing business with Gould & Preisner. The pressure was limited to the one job, which was picketed as a whole to make it wholly union and in protest against the employment there of the non-union electricians.

\* \* \* \* \*

Doose & Lintner was not neutral. It brought Gould & Preisner with the non-union labor onto the job. This brought the Council and Doose & Lintner into direct controversy. The picketing was designed to change the situation by bringing about the employment only of union labor on the Bannock Street job. There was no geographical separation at that location between Doose & Lintner and Gould & Preisner. Only by ceasing to work for Doose & Lintner could petitioners' members avoid working with Gould & Preisner's non-union men. Petitioners did not say to Doose & Lintner, in effect, "We will not work for you if you do business with Gould & Preisner." They said, in effect, "we will not work with non-union men, and therefore we will not work for you at the place to which you bring Gould & Preisner with non-union men." We think this action of petitioners was of a primary character even if petitioners envisaged it might result in a cessation of work on the particular job by Gould & Preisner.

## SPECIFICATION OF ERRORS TO BE URGED

The court below erred:

1. In holding that the strike was primary and not secondary action within the meaning of Section 8 (b) (4) (A), and therefore outside the scope of that section.

2. In holding that a primary dispute between the Council and its affiliates and Doose & Lintner existed by reason of the latter's action in bringing Gould & Preisner's non-union labor on the Bannock Street project.

3. In apparently rejecting the Board's finding that an object of the strike was to force Doose & Lintner to cease doing business with Gould & Preisner.

4. In seemingly holding that the relationship between a contractor and a subcontractor on a construction project is not comprehended by the phrase "doing business with any other person," as used in Section 8 (b) (4) (A).

5. In failing to enforce the Board's order.

## SUMMARY OF ARGUMENT

## I

A. In drawing the line between secondary strikes and picketing, which Section 8 (b) (4) (A) proscribes, and primary strikes and picketing, which the Act does not proscribe and indeed protects, the Board is required to determine whether picketing or other strike action in any given case is directed against the primary or against a secondary

employer. Where the premises of the primary and secondary employers are separated geographically, this determination can generally be made on the basis of the fact that the bounds of primary economic conflict are the primary employer's premises. Where there is no geographic separation, i.e., where both the primary and the neutral employer are doing business at the same premises, the situs test does not suffice. To hold all picketing at such shared premises to be secondary would result in banning any effective strike action against the primary employer. To hold it all primary would deny to neutral employers the protection which Congress intended to accord them, merely because of the fortuitous geographical nexus.

In determining whether picketing or other strike action in such common-situs cases is primary or secondary the Board inquires (1) whether the labor organization involved has advertised the dispute as involving the primary employer exclusively, or by its publicity or directions has indicated that it regards the dispute as extending to neutral employers as well; (2) whether the labor organization has indicated that its direct and immediate objective is to force neutral employers to cease doing business with the primary employer or is merely to curtail the primary employer's business; (3) whether the labor organization has attempted to induce employees of neutral employers to refuse to perform services for their own employer rather than merely

to refuse to render such services as assist the primary employer at the latter's place of business; (4) whether the labor organization has restricted its picketing as closely as practicable under the circumstances both in point of time and place to the immediate situs of the primary dispute.

B. Applying the foregoing criteria to the instant case, the Board properly found that respondents engaged in secondary strike action violative of Section 8 (b) (4) (A). Respondents did not confine their strike action to Gould & Preisner, the primary employer, but extended it to the operations of Doose & Lintner, a secondary employer. They publicized the entire Bannock Street project as unfair, not merely the operations of Gould & Preisner. The picketing was intended to and did serve as a signal to the employees of Doose & Lintner and its subcontractors to strike. And the express purpose of the picketing was to force Doose & Lintner to discontinue the services of Gould & Preisner.

## II

A. Respondents' contention that the strike did not have as "an object," within the meaning of the statute, forcing or requiring Doose & Lintner to cease doing business with Gould & Preisner, rests upon the fallacious premise that only respondents' ultimate objective, unionizing the project, may appropriately be considered. But it is clear that respondents attempted to achieve that goal by strike

action designed to force a cessation of business between Gould & Preisner and Doose & Lintner. This immediate object, forcing a neutral employer to cease doing business with another person, is the subject of the statutory ban. Section 8 (b) (4) (A) does not require that this be the *sole* object of the strike action. Seldom indeed is that object an end in itself. Congress deliberately banned all strike action in which cessation of business relations was "an object."

The record does not support the claim that respondents were not seeking to force Doose & Lintner to cease doing business with Gould & Preisner, but were merely refusing to work with non-union men. Under such an interpretation of respondents' strike action virtually all secondary boycotts would escape the statutory prohibition.

B. Respondents' claim that the action of Doose & Lintner in contracting for the services of Gould & Preisner gave rise to a primary dispute between respondents and Doose & Lintner is likewise incompatible with the objectives of Congress. In Section 8 (b) (4) (A) Congress sought to protect against secondary strike action neutral employers, i.e., employers who were not involved in a labor dispute over self-organization or terms and conditions of employment in their own establishments. Obviously, the fact that one employer, over a union's protest, does business with another employer who is involved in a labor dispute, does not create a dispute between the former employer and the union

over working conditions in the former's establishment. To regard the mere doing of business as itself giving rise to a primary dispute would exempt from the reach of the Act the very conduct that Section 8 (b) (4) (A) was designed to curb.

C. Respondents' contention that because a general contractor and subcontractor, like Doose & Lintner and Gould & Preisner, are engaged in work at the same construction site they are "allies" and that for this reason the general contractor is not entitled to claim the protection which Congress accorded to neutrals, overlooks the fact that although the two contractors work together on the same project they are independent as entrepreneurs and as employers. In its relation with Doose & Lintner, Gould & Preisner is clearly within the class "any other person," which Congress protected in Section 8 (b) (4) (A). There is no statutory basis for the suggestion that Gould & Preisner and Doose & Lintner were not "doing business" with each other within the meaning of Section 8 (b) (4) (A), merely because they were engaged on a common project. Although a greater degree of economic interdependence may exist between the two contractors on the one hand and between their employees on the other than exists generally between independent business enterprises, Congress refused to qualify the phrase "doing business with any other person" to take account of such community of interests. It deliberately prohibited all strike pressures directed against employers who

were not themselves immediately involved in a labor dispute. That such a result permits a general contractor to obtain, by subcontracting with a non-union concern, immunity from strike pressure which he would not enjoy if he performed the work with his own non-union employees, does not invalidate the statutory scheme. The immunity which a general contractor may obtain by this device is no different than the immunity which may be obtained by a manufacturer who chooses to purchase goods from a non-union supplier rather than produce them with non-union employees himself.

D. Respondents' contention that Section 8 (b) (4) (A) prohibits only a "product" boycott and therefore has no application to the relationship existing between a contractor and a subcontractor has no basis either in legislative history or in the statutory scheme. Such a reading of the Section would make of the phrase "or to cease doing business with any other person" mere surplusage.

E. The problem of applying the statutory line between primary and secondary strike action in common situs cases was left by Congress to the "empiric process of administration." *Phelps Dodge Corp. v. National Labor Relations Board*, 313 U. S. 177, 194. The criteria adopted by the Board in approaching this problem effectuate the objectives of Congress, and their application in this case is clearly warranted by the record. The Board's finding that respondents engaged in prohibited secondary strike action should therefore

be sustained. *National Labor Relations Board v. Hearst Publications, Inc.*, 322 U. S. 111, 130.

## ARGUMENT

### INTRODUCTION

The problems posed by this case must be put in proper perspective. In our brief in the *Rice Milling* case, No. 313, this Term, we have attempted to demonstrate that, notwithstanding the literal terms of the provision, for purposes of application of Section 8 (b) (4) (A), a distinction must be drawn between primary and secondary strike pressure, and that the section prohibits only the latter. This distinction, which the Board adopted from the very beginning and has since uniformly applied, has either been approved or assumed by every court, with the single exception of the Court of Appeals for the Fifth Circuit, which has considered the matter. The distinction was accepted by the court below in the instant case, and forms the premise of its reasoning. However, the court below gave broader scope to the exemption of primary strike pressure than did the Board, for it concluded that the strike action here, which the Board had found secondary and therefore illegal, was primary and therefore protected.

If in the *Rice Milling* case, No. 313, this Court should reject the distinction urged by the Board between primary and secondary strike action, the basic premise from which the court below proceeded would be destroyed, and it would unquestionably follow that the judgment below should be

reversed. For there could be little doubt that the strike action involved in this case falls squarely within the literal language of Section 8 (b) (4) (A), and hence—if the Board's construction be rejected—constitutes an unfair labor practice prohibited by the Act.

# I

## PICKETING AND OTHER STRIKE ACTION DIRECTED AGAINST A NEUTRAL EMPLOYER, AT A PLACE WHERE HE IS ENGAGED IN BUSINESS, IS PROPERLY HELD SECONDARY, AND THEREFORE VIOLATIVE OF SECTION 8 (b) (4) (A), ALTHOUGH THE SAME SITUS IS ALSO THE SCENE OF A LABOR DISPUTE BE- TWEEN THE UNION AND OTHER ~~EMPLOYER~~ AN EMPLOYER

In our brief in the *Rice Milling* case we have shown that Section 8 (b) (4) (A) represents an effort by Congress to achieve a satisfactory reconciliation of the interest of employees and labor organizations in exerting effective economic pressure upon employer participants in labor disputes, on the one hand, and the interest of neutral employers in immunity from economic pressure, on the other. To preserve the bargaining power of labor organizations in disputes with employers, Congress left them free to employ the traditional weapons of economic conflict, including strikes and picketing. But to protect neutral employers against becoming embroiled, to their economic detriment, in quarrels not their own, Congress "decided to draw a line at secondary boycotts."

*International Brotherhood of Electrical Workers v. National Labor Relations Board*, 181 F. 2d 34, 40 (C. A. 2).

Recognition that Section 8 (b) (4) (A) is a practical compromise between these conflicting interests has been the cornerstone of the Board's approach in the construction and application of its provisions. Because "Section 8 (b) (4) (A) is aimed at secondary boycotts and secondary strike activities \* \* \* [and] was not intended to proscribe primary action by a union having a legitimate labor dispute with an employer" (*Sailors' Union of the Pacific, AFL and Moore Dry Dock Company*, 92 NLRB No. 93, decided December 13, 1950), the Board has consistently held, as it did in the *Rice Milling* case, that strike action, including picketing, which is designed directly to induce an employer to grant economic or organizational demands is primary and not secondary, even though such picketing is also "necessarily designed to induce and encourage third persons to cease doing business with" such "primary" employer. *Oil Workers International Union and Pure Oil Company*, 84 NLRB 315, 318. On the other hand, strike action directed against an employer who is not in a position to grant the union's economic or organizational demands, i.e., a neutral or "secondary" employer, for the purpose of inducing him to cease doing business with the primary employer, is clearly forbidden by the purpose as well as by the language of Section 8 (b) (4) (A).

**A. THE BOARD'S CRITERIA FOR DETERMINING WHETHER PICKETING AND OTHER STRIKE ACTION IN COMMON SITUS CASES IS PRIMARY OR SECONDARY, ARE REASONABLE AND CALCULATED TO EFFECTUATE THE OBJECTIVES OF CONGRESS**

In the usual case, where the employer's place of business is stationary, and geographically removed from the premises of any other employer, the question whether particular strike action is directed against the "primary" employer or against a "secondary" employer is relatively simple of solution. In such a case the question is ordinarily resolved by the fact that the bounds of primary economic conflict are geographically confined to the situs of the labor dispute. If strike action is so confined, *i.e.*, if picketing is restricted to the premises adjacent to the primary employer's business, or if third persons are merely induced not to enter those premises, then the picketing is obviously primary and lawful. If picketing is not so restricted, *i.e.*, if it extends to the place of business of a neutral employer, it is secondary and unlawful. The former was the situation in the *Rice Milling* case, where Kaplan Mills and Sales House operated at different locations; the latter prevailed in the *Wadsworth*<sup>6</sup> and *Sealright*<sup>7</sup> cases. In the *Wadsworth* case the union was

<sup>6</sup> *United Brotherhood of Carpenters and Joiners of America and Wadsworth Building Company*, 81 NLRB 802, enforced 184 F. 2d 60 (C.A. 10), pending on petition for certiorari, No. 387.

<sup>7</sup> *Printing Specialties and Paper Converters Union, Local 388, A.F.L. and Sealright Pacific, Ltd.*, 82 NLRB 271.

engaged in a strike at the plant of the primary employer, a manufacturer of prefabricated houses. In order to exert pressure upon the primary employer the Union picketed a site, geographically removed from the primary employer's plant, where an independent contractor was engaged in erecting houses he had purchased from the primary employer. Similarly, in the *Sealright* case, the union which had called a strike against the primary employer picketed the premises of other employers who did business with the primary employer. The picketing in these cases, unlike the picketing in *Rice Milling*, was not confined to the situs of the primary dispute, and sought to disrupt business relations at places other than the primary employer's premises. These, therefore, were classic secondary boycotts of the very type used in the course of debate on the bill to illustrate the nature of practices which Section 8 (b) (4) (A) was designed to curb. See Brief for the Board in No. 313, pp. 28-32. In both cases the Board held that the picketing was directed against neutral employers and was therefore prohibited by Section 8 (b) (4) (A). The underlying rationale of these decisions has since been restated by the Board as follows (*International Brotherhood of Teamsters, etc.* and *Schultz Refrigerated Service, Inc.*, 87 NLRB 502, 505):

Heretofore, in cases involving an interpretation of the restriction contained in Section 8

(b) (4) (A), the primary employer, and generally, the secondary employer, conducted their operations at fixed geographical locations. Thus, in the *Wadsworth* and *Sealright* cases, it was clear that the immediate vicinity of the struck plant, the situs of the primary employer's business, constituted the area of lawful primary activity. Under those circumstances, the union by extending its picket line to the premises of other employers and thus abandoning the scene of its actual dispute with the primary employer, went beyond the protected area of primary picketing. Its picket line so extended was no longer local in point of contact to the primary employer's manufacturing operations, the only business directly involved in the labor dispute. Such picketing was secondary conduct violative of Section 8 (b) (4) (A).<sup>8</sup>

Where there is no geographic separation between the premises of the primary employer and those of a neutral employer, difficulties are encountered in drawing the line between permissible primary action and proscribed secondary action. Clearly, the line cannot be drawn at either extreme. To regard all picketing and other strike action

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<sup>8</sup> Cf. *Wine, Liquor & Distillery Workers Union, etc. (Schenley Distillers Corporation)*, 78 NLRB 504, enforced *sub nom. N.L.R.B. v. Wine, Liquor & Distillery Workers Union, etc.*, 178 F. 2d 584 (C. A. 2); *Service Trade Chauffeurs etc. (Howland Dry Goods Co.)*, 85 NLRB 1037; *Metal Polishers etc. International Union (Climax Machinery Co.)*, 86 NLRB 1243; *Local 294, International Brotherhood of Teamsters etc. (Western Express, Inc.)*, 91 NLRB No. 45.

which occurs at premises shared by the primary employer and neutral employers as primary, would grant unwarranted exemption from the ban of the statute to strike actions directed at the business of neutral employers, merely because of the fortuitous geographic factor. . On the other hand, to regard all such picketing as secondary would result in banning any effective strike action against the primary employer, where the geographic situs happens to be the same as that of a neutral employer. Effectuation of the dual objectives of Congress, i.e., to shield neutral employers from involvement in quarrels not their own, and to preserve the right of labor organizations to bring effective economic pressure to bear upon primary employers, has thus impelled the Board to invoke additional criteria, supplementary to the situs test, for determining whether the primary employer or a neutral employer is the target of the particular strike action.

These criteria are used by the Board to assist it in determining, in a wide variety of situations, whether the labor organization involved has, as the law requires, treated only the primary employer as its antagonist, or whether it has gone further and conscripted neutral employers as parties to the dispute. The Board has considered it particularly pertinent to inquire into these questions: (1) whether the labor organization involved has publicized the dispute as involving the primary employer exclusively, or has by its publicity or direc-

tions indicated that it regards the dispute as extending to neutral employers as well; (2) whether the labor organization has indicated that its direct and immediate objective is to force neutral employers to cease doing business with the primary employer, or is merely to curtail the primary employer's business; (3) whether the labor organization has attempted to induce employees of neutral employers to refuse to perform services for their own employer, rather than merely to refuse to render only such services as assist the primary employer; and (4) whether the labor organization has restricted its picketing as closely as practicable under the circumstances both in point of time and place to the immediate situs of the primary dispute. Several situations in which the Board has invoked these criteria illustrate their practical application and effect.

In one group of cases the secondary, or neutral, employer is engaged in business operations, either temporarily or permanently, on the primary employer's premises. The Board in these cases recognizes that picketing of the primary employer at his premises should not be curtailed merely because of the presence at those premises of a neutral employer and his employees. Thus, in the *Ryan*<sup>\*</sup> case, the union picketed the premises of the primary employer, including a gate that had been cut through

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<sup>\*</sup> *United Electrical, Radio and Machine Workers of America and Ryan Construction Co.*, 85 NLRB 417.

the surrounding fence to provide ingress for the employees of a contractor who was constructing additional facilities for the primary employer on his premises. The pickets carried signs advertising only their dispute with the primary employer. The Board concluded that since the picketing was confined to the premises of the primary employer and related only to the primary dispute, it was permissible primary picketing even though it had the incidental effect, intended or not, of enlisting the aid of the secondary employer's employees. In arriving at this conclusion, the Board said (85 NLRB at p. 418):

As the record reveals and the Trial Examiner finds, the Respondents, *in support of their demands on Bucyrus* [the primary employer], *proceeded to picket the entire Bucyrus premises*, including the gate that had been cut through the fence to provide ingress for Ryan [the secondary employer] employees to the site of a construction project Ryan was performing for Bucyrus. All this picketing was therefore *primary* picketing. Concededly, an object of the picketing was to enlist the aid of Ryan employees, as well as that of employees of all other Bucyrus customers and suppliers. However, Section 8 (b) (4) (A) was not intended by Congress, as the legislative history makes abundantly clear, to curb primary picketing. It was intended only to outlaw certain *secondary* boycotts, whereby unions sought to enlarge the economic battle-

ground beyond the premises of the primary Employer. When picketing is wholly at the premises of the employer with whom the union is engaged in a labor dispute, it cannot be called "secondary" even though, as is virtually always the case, an object of the picketing is to dissuade all persons from entering such premises for business reasons. It makes no difference whether 1 or 100 other employees wish to enter the premises. It follows in this case that the picketing of Bucyrus premises, which was primary because in support of a labor dispute *with Bucyrus*, did not lose its character and become "secondary" at the so-called Ryan gate because Ryan employees were the only persons regularly entering Bucyrus premises at that gate. While we agree that Section 8 (b) (4) (A) represents an intent by Congress to restrict union action to the "parties immediately involved," as the dissent states, we do not agree that by picketing the Ryan gate the Respondents were enlarging the area of the dispute. *The signs and placards carried by the pickets at the Ryan gate, which were the same as the signs carried at other gates of the Bucyrus premises, were directed at Bucyrus, not Ryan. [Italics added.]*

A similar situation was presented to the Board in the *Pure Oil* case.<sup>10</sup> There the union picketed a dock which belonged to, and was normally operated by the primary employer, with whom the

<sup>10</sup> *Oil Workers International Union and Pure Oil Co.*, 84 NLRB 315.

Union was engaged in a dispute concerning terms and conditions of employment affecting employees employed by the primary employer at the dock. Shortly before and in anticipation of the picketing, the primary employer entered into arrangements with another employer, under which the latter undertook to perform at the dock operations which had previously been performed by the striking employees of the primary employer. Rejecting the contention that the picketing, which advertised the union's dispute with the primary employer, was unlawful, the Board said (84 NLRB at pp. 318-319, 319-320) :

In this case the Union was making certain lawful demands on Standard Oil [i.e., the primary employer]. It was pressing these demands, in part, by picketing the Standard Oil dock. As that picketing was confined to the immediate vicinity of Standard Oil premises we find that it constituted permissive primary action.

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The fact that the Union's primary pressure on Standard Oil may have also had a secondary effect, namely inducing and encouraging employees of other employers to cease doing business on Standard Oil premises, does not, in our opinion, convert lawful primary action into unlawful secondary action within the meaning of Section 8 (b) (4) (A).

In another group of cases the business operations of the primary employer are ambulatory and

take place temporarily at the premises of secondary or neutral employers. In these cases the Board holds that since economic pressure can be exerted upon the primary employer only at the secondary employer's premises, picketing, if restricted to the times when the primary employer is doing business at the neutral's premises, and designed only to publicize the dispute with the primary employer, is permissible there. If not so restricted, the picketing is held secondary and unlawful.

In the *Schultz* case,<sup>11</sup> a union involved in a dispute with a trucking concern over the employment of drivers, established a U-shaped picket line around the company's trucks whenever they stopped at the business establishments of its customers to make pick-ups or deliveries. The picketing was limited physically to the trucks of the employer and continued only during such time as the trucks stopped to deliver or pick up merchandise. On these facts, the Board concluded that since the dispute between the union and the primary employer concerned the business of driving these trucks and the picketing had been limited in time and area to the primary employer's trucks, the picketing, although near the premises of the secondary employer, was identified solely with the actual functioning of the primary employer's busi-

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<sup>11</sup> *International Brotherhood of Teamsters etc. and Schultz Refrigerated Service, Inc.*, 87 NLRB 502.

ness at the situs of the labor dispute. Accordingly, the Board found that the picketing, so limited, was lawful primary action. On the other hand, in the *Sterling* case,<sup>12</sup> the union, in a situation comparable to the *Schultz* case, *supra*, continued picketing near the premises of the secondary employer after the primary employer's trucks had departed. The Board concluded that by picketing the secondary employer's premises after the primary employer's trucks had left, the union was no longer identifying its picketing with the actual functioning of the primary employer's business at the scene of the labor dispute, but had directed its picketing against the secondary employer. The Board held, therefore, that this picketing was proscribed by Section 8 (b) (4) (A).

In the *Montgomery Fair Co.*, case<sup>13</sup> the primary employer was a carpentry contractor who was involved in a labor dispute with the union. The union followed the primary employer to a department store where he was engaged on a remodeling job. However, in picketing at the department store, Montgomery Fair, the union did not restrict its pressure to the carpentry contractor but stated on its placards: "Montgomery Fair Unfair To Union Labor." The evidence showed that the purpose of this picketing was to force the store to discontinue the services of the primary employer.

<sup>12</sup> *International Brotherhood of Teamsters etc. and Sterling Beverages, Inc.*, 90 NLRB No. 75.

<sup>13</sup> *Local 1796, United Brotherhood of Carpenters etc. and Montgomery Fair Co.*, 82 NLRB 211.

The Board found that the picketing was illegal secondary action because in advertising the store as unfair the union was not publicizing its dispute with the carpentry contractor but was seeking to disrupt the operations of the department store, a neutral. Similarly, in the *Roane Anderson Case*,<sup>14</sup> the primary employer was an electrical subcontractor engaged on a project on which the general contractor, a neutral, and his employees were also engaged. The union in that case took strike action directly against the neutral employer; it called a strike of the general contractor's employees. Since the strike was directed against the general contractor, not the primary employer, and its purpose was to force the general contractor to cease doing business with the subcontractor, the Board held the strike action secondary and therefore unlawful.

In the *Moore Dry Dock case*,<sup>15</sup> the Board set forth at length the criteria which it applies in determining whether picketing and other strike action in common situs cases is primary or secondary. There the primary employer, Samsoc, was a shipowner, whose vessel, the *S.S. Phopho*, involved in the dispute, was moored for repairs at the dry dock of a neutral employer, Moore. The crew members, who were the subject of the labor dispute, were on board the vessel performing various

<sup>14</sup> *Local 760, International Brotherhood of Electrical Workers and Roane-Anderson Co.*, 82 NLRB 696.

<sup>15</sup> *Sailors' Union of the Pacific A.F.L. and Moore Dry Dock Company*, 92 NLRB No. 93.

duties. To press its demands against Samsoc the union established a picket line at the entrance to the Moore shipyards. The pickets carried placards reading "S.S. Phopho unfair to the Sailors' Union of the Pacific, A.F.L." The union had previously requested Moore's permission to place its pickets at the particular dock where the vessel was moored but had been refused. The picketing was as close to the vessel as the pickets could approach under the circumstances. The union also notified the various craft unions representing Moore's employees that the vessel was "hot" and requested their cooperation. Moore's employees, while ceasing work on the vessel, continued to perform all other work throughout the course of the strike. In holding the picketing and direct appeals to the Moore employees to be primary rather than secondary strike pressure, the Board said:

When the *situs* [of the primary dispute] is ambulatory, [the dispute] may come to rest at the premises of another employer. The perplexing question is: Does the right to picket follow the *situs* while it is stationed at the premises of a secondary employer, when the only way to picket that *situs* is in front of the secondary employer's premises? Admittedly, no easy answer is possible. Essentially the problem is one of balancing the right of a union to picket at the site of its dispute as against the right of a secondary employer to be free from picketing in a controversy in which it is not directly involved.

When a secondary employer is harboring the *situs* of a dispute between a union and a primary employer, the right of neither the union to picket nor of the secondary employer to be free from picketing can be absolute. The enmeshing of premises and *situs* qualifies both rights. In the kind of situation that exists in this case, we believe that picketing of the premises of a secondary employer is primary if it meets the following conditions: (a) The picketing is strictly limited to times when the *situs* of dispute is located on the secondary employer's premises; (b) at the time of the picketing the primary employer is engaged in its normal business at the *situs*; (c) the picketing is limited to places reasonably close to the location of the *situs*; and (d) the picketing discloses clearly that the dispute is with the primary employer. [Footnotes omitted.]

The Board concluded that since all of these conditions had been met, the picketing was aimed at Samsoc and was therefore lawful.

**B. THE BOARD HAS PROPERLY APPLIED THESE RELEVANT CRITERIA IN CASES INVOLVING CONSTRUCTION PROJECTS, SUCH AS THIS.**

Building construction cases constitute a large block of the cases in the common *situs* category. Construction work is commonly performed by general contractors and subcontractors, several of whom are at the same time engaged in work on the job. When a labor organization, engaged in a dispute either with the general contractor or with one

or more of the subcontractors, exerts strike pressure at the construction project, the Board applies the criteria set out above to determine whether the picketing is directed only at the primary employer's business or at the business of the neutral employers.

### 1. *The Watson type of case*

If, for example, a union calls a strike of the employees of the general contractor because a subcontractor with whom the union is engaged in a labor dispute is also at work on the job, the strike action is clearly secondary and unlawful. This was the situation in the *Roane Anderson* case, *supra*. The result would be the same if the strike were called among employees of a neutral subcontractor because the general contractor or another of the subcontractors on the project was engaged in a labor dispute with the union. This was the situation in the *Watson* case, No. 85, this Term, where the union called a strike of the carpentry contractor's employees because a nonunion floor covering contractor (Watson) had been engaged to install the floor coverings, an object of the strike being to force Stanley, the owner, to cease doing business with Watson.

### 2. *The Langer and Denver type of case*

If, instead of engaging in direct strike action of this character, a union pickets the project for the

purpose of inducing the employees of neutral employers to strike, the Board considers that this conduct also is barred by Section 8 (b) (4) (A). This is what was done in the instant case (*Denver*) and in the *Langer* case, No. 108, this Term. In both cases the evidence clearly established that the picketing was directed against neutral employers; that it was designed to induce employees of these employers in concert to cease work; and that an object of the picketing was to force the neutral employers to cease doing business with the particular employer involved in the dispute.

The situations presented in the instant case and in Nos. 85 and 108, are thus entirely distinguishable from those presented in the *Ryan*, *Pure Oil*, *Schultz* and *Moore Dry Dock* cases, *supra*, pp. 27-35. In *Ryan* and *Pure Oil* the picketing occurred at the premises of the primary employer and the signs and placards carried by the pickets clearly identified the dispute as being with the primary employer only. The mere presence of the secondary employer at those premises was not enough to transform what was clearly primary pressure into secondary action. Likewise, in *Schultz* and *Moore Dry Dock*, where the premises of the secondary employer were also the temporary situs of the primary dispute, the unions clearly identified their picketing with the primary employer only. In the instant case and in Nos. 85 and 108, on the other hand, the unions by failing entirely to limit their

picketing to the primary employers involved exceeded the bounds of allowable primary pressure.

C. THE BOARD'S FINDINGS THAT THE STRIKE PRESSURE EXERTED IN THE INSTANT CASE WAS SECONDARY AND HAD AS AN OBJECT FORCING A NEUTRAL EMPLOYER TO CEASE DOING BUSINESS WITH THE PRIMARY EMPLOYER ARE SUPPORTED BY SUBSTANTIAL EVIDENCE.

In the instant case, respondents approached the general contractor, a neutral, and threatened to picket the project unless the general contractor ceased doing business with the particular subcontractor with whom respondents were engaged in a dispute. When the general contractor refused to accede to this demand respondents placed a picket in front of the project with a placard reading "This job unfair to Denver Building and Construction Trades Council." When the picketing commenced the unionized employees of the general contractor and the subcontractors ceased work on the project and did not resume until two weeks later when the general contractor acceded to respondents' demand that it cease dealing with Gould & Preisner.

The action of the Council and its affiliates was thus equivalent to calling a strike of the members of the Council's affiliated unions employed by Doose & Lintner, the general contractor, and his subcontractors. It was taken pursuant to the Council's bylaws which empower its Board of Business Agents "to declare a job unfair and remove all men from the job," and authorize the repre-

sentatives of the Council "to order all strikes when instructed to do so by the Council or Board of Agents." The strike was put into effect when Goold; the Council's business agent, acting under its instructions, posted the picket at the Bannock Street project with a placard labelling the job as unfair to the Council. The picket, as Goold had warned Doose & Lintner, served as notice to the union workers on the job to stop work, in compliance with union rules.<sup>16</sup> As the Board properly found (R. 239, 258), therefore, "It is \* \* \* evident that the picket sign announcing that the Bannock Street project was unfair to the Council constituted a clear signal in the nature of an order, to the members of respondent unions, as well as to the members of other unions affiliated with the Council . . . to withhold their services for the duration of the picketing."

It is also clear, as the Board found, that the strike action was directed against Doose & Lintner, the secondary employer, and not merely against Gould & Preisner, the primary employer. The picketing of the Bannock Street project was not limited to publicizing the dispute between respondents and Gould & Preisner, and its non-union employees. No attempt was made to identify the picketing solely with the operations of Gould & Preisner. On

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<sup>16</sup> Cf. the observation of the Court of Appeals for the Ninth Circuit in *Printing Specialties and Paper Converters Union, Local 388 v. Le Baron*, 171 F. 2d 331, 334, "The reluctance of workers to cross a picket line is notorious."

the contrary, the picketing, as the wording of the placard carried by the picket attested, was directed against the entire project and the operations of Doose & Lintner at that site. And the picketing, as respondents' representative informed Doose & Lintner, was designed to enlist the employees of Doose & Lintner and of its subcontractors and thereby disrupt and bring to a halt Doose & Lintner's operations at the building site. The picketing served, as it was expressly intended, as a signal to these employees to strike against Doose & Lintner; after Doose & Lintner capitulated, respondents called off the strike by removing the picket.

Plainly, too, an object of the strike pressure thus exerted by respondents against Doose & Lintner was to compel it to terminate the services of Gould & Preisner on the Bannock Street project. As long as Gould & Preisner refused to unionize its operations, Doose & Lintner could settle the strike only by terminating its contract with Gould & Preisner and removing it from the Bannock Street job. Indeed, this object is implicit in the suggestion made by the representatives of respondent Plumbers, McDonough, to Doose, that if he (McDonough) were a contractor "he probably could get rid of Gould & Preisner," and the statement made by Gould, the Council's representative, to Doose that if Gould & Preisner worked on the job, the Council would picket the job. Moreover, in the light of Gould & Preisner's refusal to unionize its operations and its determination, which was

made known to respondents, to fulfill its contract on the Bannock Street project unless "bodily put off," it is apparent that the strike against Doose & Lintner could have had no other immediate purpose than that of forcing or requiring Doose & Lintner to terminate its business relationship with Gould & Preisner, certainly with respect to the Bannock Street Building. To find otherwise would be to say that "the [strike] order and the effort to enforce it were vain and idle things without any rational purpose whatsoever." *Bedford Cut Stone Company v. Journeymen Stone Cutters' Association of North America*, 274 U.S. 37, 45-46. See also *Printing Specialties and Paper Converters Union v. Le Baron*, 171 F. 2d 331 (C.A. 9). Thus, as the Board justifiably found (R.239, 258), the strike had the planned and expected purpose of denying the services of all union workmen to Doose & Lintner on the Bannock Street job as long as it continued to utilize the services of Gould & Preisner there and of forcing the termination of the business relationship between them, as it in fact did.

## II

RESPONDENTS' CONTENTION THAT IT WAS NOT AN OBJECT OF THE STRIKE ACTION TO FORCE A CESSATION OF BUSINESS BETWEEN TWO PERSONS WITHIN THE MEANING OF THE STATUTE IS WITHOUT MERIT.

In this case and in Nos. 108 and 85, the labor organizations contend, as a matter of law, that where

strike action is taken against one or more contractors on a building project with the ultimate object of unionizing or improving the working conditions of employees of other contractors on the project, the strike action may not be said to have as "an object," within the meaning of the statute, forcing one contractor to cease doing business with another. They also urge that the phrase "doing business with any other person," as used in Section 8 (b) (4) (A), should not be held to apply to the relationship between a general contractor and a subcontractor on a building project, and that all picketing of construction projects, though designed to sever the business relationship between contractors, should be held primary rather than secondary. The labor organizations also contend that when a general contractor brings to a building site a subcontractor with whom the union is engaged in a dispute, the general contractor creates a dispute between himself and the union over employment of the subcontractor and that pressure against the general contractor in these circumstances is to be regarded as primary with respect to the latter. Finally, the unions argue that Section 8 (b) (4) (A) was designed to outlaw only so-called "product boycotts," i.e., refusals to work upon goods produced under union-disapproved conditions, and was not directed at other types of secondary boycotts. To these contentions we now turn.

A. UNDER SECTION 8 (b) (4) (A), WHERE "AN OBJECT" OF SECONDARY STRIKE ACTION IS TO FORCE A CESSATION OF BUSINESS RELATIONS BETWEEN TWO EMPLOYERS, THE STRIKE ACTION IS UNLAWFUL WHETHER OR NOT OTHER OBJECTS ARE ALSO INVOLVED.

The court below in the instant case rejected the Board's finding that an object of the strike action was to force or require Doose & Lintner to cease doing business with Gould & Preisner. It was of the view that the purpose of the Council was to make the Bannock Street project all union and that "accordingly *the* object was not in any literal sense to require Doose & Lintner to cease doing business with Gould & Preisner." (Italics supplied.) Undoubtedly, an ultimate objective of the Council and its affiliates was to make the Bannock Street project wholly union. But, it is clear that they sought to achieve that objective by strike action designed to force Doose & Lintner to remove Gould & Preisner from the project. Under the Act it is enough that *an* object of a strike is to force an employer to cease doing business with another person. Nothing in the terms, purposes, or legislative history of the Act suggests that it must be the sole object.

That the Board has properly construed the deliberate intention of Congress is borne out not only by the text of Section 8(b)(4)(A), but also by its legislative history.<sup>17</sup> Section 8(b)(4) of the

<sup>17</sup> Compiled in *Legislative History of the Labor Management Relations Act, 1947* (Gov't. Print. Off., 1948).

bill which became the Act, as it passed the Senate,<sup>18</sup> made it an unfair labor practice for a labor organization or its agents to engage in strike action, "for the purpose of" accomplishing one or more of the objectives specified in the subdivisions of that section. In conference, the words "where *an* object thereof" were substituted for the words "for the purpose of." [Italics supplied.] In a supplementary analysis of the bill as passed, which Senator Taft, one of the co-authors of the legislation, submitted to the Senate, he explained the reason for the change as follows:

Section 8 (b) (4), relating to illegal strikes and boycotts, was amended in conference by striking out the words "for the purpose of" and inserting the clause "where an object thereof is." Obviously the intent of the conferees was to close any loophole which would prevent the Board from being blocked in giving relief against such illegal activities simply because one of the purposes of such strikes might have been lawful.<sup>19</sup>

<sup>18</sup> H. R. 3020, as passed Senate, 80th Cong., 1st Sess., at pp. 82-83.

<sup>19</sup> 93 Cong. Rec. 6859, *Leg. Hist.*, p. 1623. This explanation was made apparently in answer to Senator Murray who, criticizing Section 8 (b) (4), said, "Let me direct attention to that little word 'an.' For many generations the courts have followed what is known as the primary objectives test; even prior to the passage of the Norris-LaGuardia Act the courts had developed a doctrine that they would look to the primary objective of the strike rather than to all its objectives. Manifestly, different strikers have differing motives; any strike may have several different objects. Those limitations, imposed by the Supreme Court in the early part of the century when it was considered by many to be hostile to the purposes of trade

Accordingly, "It is not a defense that other motives may have entered into the action of the respondent[s]. Section 8 (b) (4) (A) forbids a work stoppage by the union when 'an object thereof' is to require the employer to cease dealing [with] another." *National Labor Relations Board v. Wine, Liquor & Distillery Workers Union*, 178 F. 2d 584, 586 (C. A. 2).

The court below viewed the instant case as one where respondents in effect said to Doose & Lintner, "We will not work with non-union men, and therefore we will not work for you at the place to which you bring Gould & Preisner with non-union men," rather than, "We will not work for you if you do business with Gould & Preisner." (R. 279). But this is, after all, a question of fact for the Board—and, as we have shown above (*supra*, pp. 40-41), the evidence not only does not support this characterization by the court below, but in fact amply justifies the contrary finding made by the Board. Respondents, as the Board found (R. 229, 233, 258), made it amply clear to Doose & Lintner that their purpose was to force Doose & Lintner to get rid of Gould & Preisner and that Doose & Lintner's only escape from the strike called by them lay in a termination of its business arrangement with Gould & Preisner. The court below, had it been sitting as a trier

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unions, is by that single word repealed. We are no longer to look to the primary motive; it is enough if it can be proved that any striker has an improper motive, or that an extremely minor and subsidiary issue in the strike was improper." 93 Cong. Rec. 6497, *Leg. Hist.*, pp. 1569-1570.

of the facts *de novo*, would not have reached the same factual conclusion as the Board; but this does not, of course, justify it in setting aside the finding made by the Board, supported as it is by abundant evidence.

Secondly, even if the lower court's characterization of the evidence were warranted, it would not remove the case from the ban of the statute. For such a characterization involves disregard of the method whereby the union seeks to achieve its ultimate objective—i.e., the forcing of one employer, by total or partial strike action directed against him, to cease doing business with another. It is precisely against the use of such methods to obtain a union's ultimate objective that the statute was aimed. The approach of the court below permits virtually all secondary boycotts to escape the statutory prohibition. For example, suppose employer B operates a non-union shop and for that reason is designated unfair by a union; that B in the course of his business sells his products to employer A for use in the latter's shop; and that A's union employees are directed by their union to refuse to handle, work on or use these products because they are non-union made products. Applying the reasoning of the court below, it could be said with equal validity there, as in the case at bar, that the union was not in effect telling A to cease doing business with B but was merely notifying A that its members would not work on, or use, the non-union products of B, and that, therefore, no violation of Section 8 (b) (4) (A) has occurred.

Yet, Section 8 (b) (4) (A) was specifically designed to make it unlawful for a union, among other things, to refuse, at the premises of a secondary employer, to work on disfavored goods, i.e., "to boycott employer A because employer A uses or otherwise deals in the goods of or does business with employer B (with whom the union has a dispute)." <sup>20</sup> There can thus be no question that such action on the part of the union would run counter to Section 8 (b) (4) (A); and the courts have uniformly so held. <sup>21</sup>

There is no difference between such a situation and the one here, where the union orders A's employees to engage in a strike because A has subcontracted for the services of B instead of purchasing the latter's products. "The phrase 'doing business,' would ordinarily cover doing any business which the third party is free to discontinue, regardless of whether he is merely supplying materials to the employer, or has subcontracted with him to perform part of a work which the third party has himself contracted to do." Chief Judge Learned Hand in *International Brotherhood of Electrical Workers v. National Labor Relations Board*, 181 F. 2d 34, at p. 37. Whenever A's employees are

<sup>20</sup> S. Rep. No. 105 on S. 1126, 80th Cong., 1st Sess., p. 22; See Brief for National Labor Relations Board in No. 313, pp. 27-29, 30-31.

<sup>21</sup> *National Labor Relations Board v. Wine, Liquor & Distillery Workers Union*, 178 F. 2d 584 (C. A. 2); *United Brotherhood of Carpenters, etc. v. Sperry*, 170 F. 2d 863 (C. A. 10); *National Labor Relations Board v. United Brotherhood of Carpenters, etc.*, 184 F. 2d 60 (C. A. 10), pending on petition for certiorari, No. 387, this Term.

ordered to strike because A purchases B's products or because A contracts for B's services, *an* object of the strike is necessarily to force A to terminate his business relations with B, and hence brings it within the express prohibitions of the Act.

**B. THE ACTION OF AN EMPLOYER IN CONTRACTING FOR THE SERVICES OF ANOTHER EMPLOYER WITH WHOM THE UNION IS ENGAGED IN A LABOR DISPUTE DOES NOT GIVE RISE TO A PRIMARY DISPUTE WITHIN THE MEANING OF SECTION 8 (b) (4) (A).**

The court below also stated that Doose & Lintner could not be regarded as a neutral within the meaning of Section 8 (b) (4) (A) because it had been instrumental in bringing Gould & Preisner, with whom the union had a dispute, to the Bannock Street project. It characterized the picketing as primary because "it was aimed at conditions at the site of the picketing for which [Doose & Lintner] was at least in part responsible." This concept of "neutrality," justifiable as it might be in other contexts and for other purposes, is, as applied to Section 8 (b) (4) (A), wholly at variance with the Congressional understanding of that term. The purpose of Congress in enacting Section 8 (b) (4) (A), as we have pointed out (see Brief for the Board in the *Rice Milling* case, pp. 26-32), was to eliminate strikes or the inducement thereof aimed at employers who were "wholly unconcerned in the disagreement" between a union and another employer. The illustrations used by proponents of the bill disclose that by an "unconcerned" em-

ployer Congress meant an employer who is not involved in a labor dispute with his own employees over such matters as union recognition or particular economic issues directly affecting the terms and conditions of employment of his own employees (*ibid.*). In view of the legislative background and purposes of the Act, the Board considers that the mere fact that such an employer, over a union's objection, does business with an employer who is involved in a primary labor dispute does not deprive him of his status as a "neutral" and make him a party to a primary dispute between himself and the union, within the meaning of Section 8 (b) (4) (A). A contrary construction of Section 8 (b) (4) (A) would exempt from the reach of the Act the precise conduct which the legislative history shows it was designed to prevent.

The circumstance that Doose & Lintner may have "created" the situation that immediately resulted in the picketing and the strike would not destroy its status as a "neutral" under Section 8 (b) (4) (A). An analogy will serve to demonstrate this. Suppose that employer A in the course of his business purchases, for use in his plant, machinery made by employer B who operates a non-union shop and that A's employees are ordered to strike because A has brought B's non-union made machinery into the plant. In a sense, it would be true to say that A, by bringing B's machinery into his plant, has created a situation giving rise to a "direct contro-

versy" between A and his employees. But if this be regarded as controlling, the practical effect would be to negate what Congress undoubtedly intended to accomplish. It is clear that what Congress objected to was the use of strikes and boycotts against employers involved in just such controversies as this, and that Section 8 (b) (4) (A) was enacted primarily to put an end to this specific practice. *National Labor Relations Board v. Wine, Liquor & Distillery Workers Union, etc.*, 178 F. 2d 584 (C. A. 2); *National Labor Relations Board v. United Brotherhood of Carpenters and Joiners of America, etc.*, 184 F. 2d 60 (C. A. 10); pending on petition for certiorari, No. 387, this Term; Cf. *Duplex Co. v. Deering*, 254 U. S. 443. We submit that no distinction can be drawn between such a case and one where, as here, instead of bringing B's machinery into his plant, A contracts for B's services at A's place of business.

The court below distinguished the two cases on the ground that in the instant case the picketing and the strike action were "designed to change the situation by bringing about the employment only of union labor on the Bannock Street project" and that they were "aimed at conditions at the site of the picketing for which [Doose & Lintner] was in part responsible." But it can equally be said in the illustration above that by bringing B's machinery into his plant, A has created a condition at the site of the strike for which A is at least in part

responsible and that the strike of A's employees is designed to change the situation by forcing A to discontinue the use of non-union made machinery.

We submit that the two situations are not distinguishable, as the court below further suggested, on the ground that in the one there is geographic separation between the places of business of the two employers, whereas in the other there is no such separation. As we have shown above, pp. 25-35, lack of geographic separation may sometimes make it difficult to determine whether strikes or picketing are primary or secondary, but once it is determined, as it was determined here by the Board, that the strike action is secondary, it falls within the statutory ban, whether or not occurring at premises also shared by the primary employer.

**C. THE ACTION OF AN EMPLOYER IN CONTRACTING FOR THE SERVICES OF ANOTHER EMPLOYER WITH WHOM THE UNION IS ENGAGED IN A LABOR DISPUTE DOES NOT MAKE THE CONTRACTING EMPLOYER A PARTY TO THE EXISTING DISPUTE.**

The labor organizations have also argued that the operations of a general contractor and a subcontractor on any particular construction site where they are engaged are so integrated that the two are in effect "allies," or a single entity, and that the general contractor cannot be regarded as a neutral in any dispute between a union and a subcontractor. But this argument overlooks the fact that although the general contractor and subcontractors work together on the same project they

remain independent, as entrepreneurs and as employers.

A subcontractor, as established by usage in the building trades, "is one who performs for and takes from the prime contractor a specific part of the labor or material requirements of the original contract. . . ." *MacEvoy Co. v. United States*, 322 U. S. 102, 108-109. A subcontractor, like Gould & Preisner here, buys his own materials, has his own labor force, and handles his own labor problems. He is an independent employer and is engaged in a business of his own. He bids for work, usually in competition with others.<sup>22</sup> In these circumstances, it "would do violence to the plain common-sense meaning of the words" used in the statute (*Colvin v. Kokusai Kisen Kabushiki Kaisha*, 72 F. 2d 44, 45 (C. A. 3)), to hold that a subcontractor is not "any other person" in relation to the general contractor<sup>23</sup> and that the two are not

<sup>22</sup> Haber, William, *Industrial Relations in the Building Industry* (1930), pp. 57-58; Twentieth Century Fund, *How Collective Bargaining Works* (1942), pp. 193-194; Hearings before the Temporary National Economic Committee, Investigation of Concentration of Economic Power, 76th Cong., 1st Sess., pp. 5177-5183.

<sup>23</sup> In the court below respondents, in support of their contention that a general contractor and subcontractors are to be regarded as a unified business enterprise, called attention to various decisions under various workmen's compensation statutes and public works laws holding that a general contractor with respect to the employees of a subcontractor is not a person other than their employer. *E.g., Jennings v. Vincent's Adm'r*, 234 Ky. 614, 145 S. W. 2d 537; *McEvilly v. L. E. Myers Co.*, 211 Ky. 31, 276 S. W. 1068; *Leebolt v. Leeper*, 128 Kans. 61, 275 P. 1087; *Bogoratt v. Pratt & Whitney Aircraft*

"doing business" with one another.<sup>24</sup>

Doose & Lintner was a separate and distinct enterprise from Gould & Preisner. Except for the general direction which a prime contractor normally exercises over the operations of a subcontractor on a particular construction job, it had no control over Gould & Preisner. Of course, in one sense, joint participation in a particular construction project makes the contractors "allies." But, in the same sense, the economic system also makes a manufacturer and his suppliers, or distributors, "allies." There can be little doubt, however, that the manufacturer is "doing business" with his suppliers or distributors and that the latter are "other persons," in the statutory sense. Neither the words nor the purpose of the statute permit a distinction to be drawn between a manufacturer and his suppliers or distributors on the one hand, and a general contractor and a subcontractor on the other. In

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Co., 114 Conn. 126, 157 A. 860; *Bunner v. Patti*, 343 Mo. 274, 121 S. W. 2d 153. But cf. *Colvin v. Kokusai Risen Kabushiki Kaisha*, 72 F. 2d 44 (C. A. 5), and cases cited there. These statutes are without significance here for, as the cases decided thereunder recognize, they are remedial legislation in which the State, as a matter of public policy, has swept aside distinctions based on the identity of the employer in order to give the most complete protection possible to the employees. See, e. g. *Cermak v. Milwaukee Air Power Pump Co.*, 192 Wis. 44, 211 N. W. 354; *Bailey v. Mosby Hotel Co.*, 160 Kans. 258, 160 P. 2d 701; *Halpin v. Industrial Commission*, 319 Ill. 130, 149 N. E. 764; *Bello v. Notkins*, 101 Conn. 34, 124 A. 831; 48 Col. L. Rev. 1253.

<sup>24</sup> Dennis, William L., *The Boycott in Labor Disputes*, New York University Second Annual Conference on Labor (1949), p. 471.

each case two separate and distinct enterprises are dealing with each other; by any standard, they are "doing business" with each other. "We cannot see why it should make any difference that the third person is engaged in a common venture with the employer, or whether he is dealing with him independently. The phrase, 'doing business,' would ordinarily cover doing any business which the third party is free to discontinue, regardless of whether he is merely supplying materials to the employer, or has subcontracted with him to perform part of a work which the third party has himself contracted to do. The third party cooperates as truly with one to whom he furnishes materials as with a subcontractor. Indeed, when the coercion is upon the third person to break a contract with the employer, his position is more embarrassing than if he may discontinue his relations with the employer without danger of liability. The phrase, 'cease doing business,' is general and admits of no such evasion." *International Brotherhood of Electrical Workers v. National Labor Relations Board*, 181 F. 2d 34, 37 (C. A. 2).

It may be true that the integration between the operations of the general contractor and the subcontractor, engaged on a common construction project, creates a greater degree of economic interdependence between the employees on the one hand and the employers on the other<sup>25</sup> than exists

<sup>25</sup> Restatement, Terts. Vol. IV, Sec. 799, Comment on Clause (d).

in the case of a manufacturer and his suppliers or distributors. But Congress did not make the application of the Act turn upon presence or absence of economic interdependence between employers and employees; it chose instead to make the test the existence of an independent business relationship.

During the course of the legislative debate, Section 8 (b) (4) (A) was criticized<sup>26</sup> because it indiscriminately prohibited secondary strikes, or the inducement of employees to engage in such strikes, regardless of the "community of interest"<sup>27</sup> that might exist between the employees of the primary and secondary employer or the "unity of interest" between the primary and secondary employer.<sup>28</sup> In some jurisdictions application of

<sup>26</sup> 93 Cong. Rec. 4196-4197, 4844-4845, 4859, *Leg. Hist.*, pp. 1104-1105, 1106-1107, 1366-1368, 1371; see also the President's veto message, *Leg. Hist.*, p. 918.

<sup>27</sup> The concept of "community of interest" between such workers finds expression in the dissenting opinion of Mr. Justice Brandeis in *Duplex Co. v. Deering*, 254 U. S. 443, 480, which Senator Pepper, who opposed Section 8 (b) (4) (A), quoted in the course of the legislative debate, 93 Cong. Rec. 4197, *Leg. Hist.*, p. 1104.

<sup>28</sup> This "unity of interest" concept has been phrased as follows by the New York Court of Appeals in *Goldfinger v. Feintuch*, 276 N. Y. 2-1, 11 N. E. 2d 910, 913:

Within the limits of peaceful picketing, however, picketing may be carried on not only against the manufacturer but against a nonunion product sold by one in unity of interest with the manufacturer who is in the same business for profit. Where a manufacturer pays less than union wages, both it and the retailers who sell its products are in a position to undersell competitors who pay the higher scale, and this may result in unfair reduction of the wages of union members. Concededly the defendant union would be entitled to picket peacefully the plant of the manufacturer. Where the manufacturer disposes of the product through retailers in unity of interest with it,

these common law concepts had resulted in legalizing some secondary strike pressures. For example, some courts held that strike action against a general contractor on a building project because he had engaged the services of a non-union subcontractor did not constitute a "secondary boycott" and was therefore lawful.<sup>29</sup> Other courts rejected these concepts and held that such strike action directed against the general contractor in order to compel him to get rid of the non-union subcontractor was an unlawful secondary boycott.<sup>30</sup> Con-

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unless the union may follow the product to the place where it is sold and peacefully ask the public to refrain from purchasing it, the union would be deprived of a fair and proper means of bringing its plea to the attention of the public.

<sup>29</sup> Typical of these decisions is the holding in *Gray v. Building Trades Council*, 91 Minn. 171, 97 N. W. 663.

Accord: *Cohn & Roth Electric Co. v. Bricklayers', etc., Local Union No. 1*, 92 Conn. 161, 101 Atl. 659; *Grant Construction Co. v. St. Paul Building Trades Council*, 136 Minn. 167, 161 N. W. 520.

<sup>30</sup> Holding that such strike action was an unlawful secondary boycott, the Seventh Circuit Court of Appeals, in language closely paralleling Senator Taft's illustration of the evil against which Section 8 (b) (4) (A) was directed (See Brief for the National Labor Relations Board in No. 313, pp. 30-31), said (*International Brotherhood of Electrical Workers, Local Union No. 134 v. Western Union Telegraph Co.*, 6 F. 2d 444, 445):

The things that were done were not done because of any violation by the employer of any term of the contract of employment. They were not done to induce the payment of higher wages, better working conditions, or for any other lawful purpose. But they were done to compel their own perfectly satisfactory employers, or the owners of the premises where appellee was doing or desired to do its installation work, to injure and annoy appellee, and to cause such employers to violate contracts with appellee for the sole reason that appellee employed nonunion men.

Accord: *Pickett v. Walsh*, 192 Mass. 572, 78 N.E. 753; *Blandford v. Duthie*, 147 Md. 388, 128 Atl. 138; *Lehigh Structural Steel Co. v. Atlantic Smelting & Refining Works*, 92 N. J. Eq.

gress deliberately refused to predicate distinctions upon these concepts. Senator Taft made it clear that Section 8 (b) (4) (A) contemplated no distinction with respect to secondary strike action based on these concepts and that the purpose of the Section was to outlaw all strike action aimed and directed immediately against an employer whose only connection with a labor dispute lay in the circumstance that he was doing business with an employer directly involved in such a dispute. He said:<sup>31</sup>

The difficulty with the Clayton Act and the Norris-LaGuardia Act is that they went at the situation with a meat ax. They practically eliminated all legal remedy against unions for any action taken by them. In effect they provide as construed by the courts, at least—that any action by a union taken in order to advance its own interests is proper, and there is no legal recourse against the union. The laws referred to do not discriminate between strikes for justifiable purposes and strikes for wholly illegal and improper purposes. They do not distinguish between strikes for higher wages and hours and better working conditions, which are entirely proper and which throughout this bill are recognized as completely proper strikes, and strikes in the nature of secondary boycotts \* \* \*. The

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131, 111 Atl. 376; *Snow Iron Works, Inc. v. Chadwick*, 227 Mass. 382, 116 N. E. 801; *Jetton-Dekle Lumber Co. v. Mather*, 53 Fla. 969, 43 So. 590.

<sup>31</sup> 93 Cong. Rec. 3835, 4198, *Leg. Hist.*, pp. 1005-1006, 1106.

acts simply eliminated all remedy against any union, leaving the union leaders free, practically without any control even by their members, to order strikes and boycotts and various kinds of actions that interfered, I believe certainly unlawfully under common law, with the activities of many other persons who were entirely innocent.

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This provision makes it unlawful to resort to a secondary boycott to injure the business of a third person who is wholly unconcerned in the disagreement between an employer and his employees. The Senator [Pepper] will find a great many decisions written by my father which hold that under the common law a secondary boycott is unlawful. Subsequently, under the provisions of the Norris-LaGuardia Act, it became impossible to stop a secondary boycott or any other kind of a strike, no matter how unlawful it may have been at common law. All this provision of the bill does is to reverse the effect of the law as to secondary boycotts. *It has been set forth that there are good secondary boycotts and bad secondary boycotts. Our committee heard evidence for weeks and never succeeded in having anyone tell us any difference between different kinds of secondary boycotts. So we have so broadened the provision dealing with secondary boycotts as to make them an unfair labor practice. [Italics added.]*

In sum, Congress enacted a blanket prohibition against all strike pressures directed against em-

ployers other than those immediately involved in a labor dispute without regard to such distinctions as community or unity of interest.<sup>32</sup> Accordingly, the phrase "doing business with any other person" contained in Section 8 (b) (4) (A) permits no limitation based upon these concepts which would exclude from the reach of the statute the business relationship between a contractor and a subcontractor.

An argument, analogous to that urged here, was made in *National Labor Relations Board v. Wine, Liquor & Distillery Workers Union, etc.*, 178 F. 2d 584 (C. A. 2). It was asserted there that the distributors who, in part, or exclusively, handled the products of the primary employer were in an economic sense "allies" and that therefore they could not be regarded as "neutrals" in a dispute involving the primary employer. Rejecting this contention, the Court of Appeals for the Second Circuit said (at p. 587):

The respondent makes the further defense to the enforcement order that the distributors were so-called "allies" of Schenley and that

<sup>32</sup> This is not to say that Section 8 (b) (4) (A) forecloses strike pressure against an employer who, though separate in form, is found to be in actuality merely the *alter ego* of the primary employer. This was the situation presented in *Douds v. Metropolitan Federation of Architects, etc.*, 75 F. Supp. 672 (S. D. N. Y.). As the Second Circuit Court of Appeals said of the *Douds* case, there "the supposititious third person was only a disguise for the [primary] employer." *International Brotherhood of Electrical Workers v. National Labor Relations Board*, 181 F. 2d 34, 38. See also *National Union of Marine Cooks & Stewards (Irwin-Lyons Lumber Co.)*, 83 NLRB 341.

their trade relations with it were so intimate that there was a community of interest which justified a strike as fully as though all the employees had belonged to the same company. This is a far-fetched argument, for the distributors had no relations with Schenley other than as independent corporations whose purchases for the market were largely of Schenley products.

Although the relationship between a general contractor and a subcontractor was not specifically referred to by the proponents of the legislation as one which would constitute "doing business" with any other person within the meaning of Section 8 (b) (4) (A), there is no reason to believe that Congress intended to treat that relationship any differently from the relationship existing between a manufacturer and his suppliers or distributors.<sup>33</sup> The conscription of Doose & Lintner's employees into the dispute between respondents and Gould & Preisner enlarged the area of economic conflict in precisely the manner which Congress sought to prevent. The Board's

<sup>33</sup> It is noteworthy that Senator Murray, who opposed Section 8 (b) (4) (A), understood it to mean, without challenge from the sponsors of the Act, that "It would be unlawful for the union workers to refuse to work next to nonunion workers of another employer engaged in a common project" (93 Cong. Rec. 4845, *Leg. Hist.*, p. 1367). Read in the context of Section 8 (b) (4) (A) and Section 13 of the Act we interpret this statement to mean that in Senator Murray's opinion it would be unlawful under Section 8 (b) (4) (A) for a labor organization to engage in, or to induce or encourage employees to engage in a strike or a concerted refusal to perform services for their employer because of the presence of a non-union employer on a common project, such as the construction job here.

conclusion that the protection of Section 8 (b) (4) (A) extends to an employer like Doose & Lintner is therefore entirely warranted.

Apart from the asserted economic interdependence between the general contractor and subcontractors, the only consideration which has been advanced to support the contention that a general contractor should not be regarded as "another person" in a dispute between a union and a subcontractor is that a contrary view would permit general contractors to purchase immunity from strike pressure against themselves by engaging non-union subcontractors to perform work which, if performed by the general contractor with non-union labor directly, would subject him to permissible strike pressure.<sup>34</sup> To this there are two answers. First, under the statute as construed by the Board, strike pressure may properly, in such cases, be brought to bear upon the subcontractor; thus, the employment of a subcontractor does not immunize the performance of work under union-disapproved conditions from economic pressure.<sup>35</sup> Secondly, if

<sup>34</sup> *Mills v. United Ass'n of Journeymen and Apprentices*, 83 F. Supp. 240 (W. D. Mo.); see also dissenting opinion of Clark, J. in *International Brotherhood of Electrical Workers v. National Labor Relations Board*, 181 F. 2d 34, 41 (C.A. 2).

<sup>35</sup> The discussion assumes that the strike pressure has for its ultimate object inducing non-union employees to join the union, or otherwise improving working conditions of employees whom the union represents. Strike pressure designed to force an employer, a majority of whose employees are not members of the union, to force his employees against their will to join is made unlawful in any event by Section 8 (b) (2) of the Act. *Denver Bldg. & Construction Trades Council (Henry Shore)*, 90 NLRB 224.

this were not true, the unions' argument could, in any event, appropriately be addressed only to Congress, not the Board or the courts. Undoubtedly, a prohibition against picketing of a general contractor in the circumstances of this case blunts a weapon traditionally utilized by unions, but in Section 8 (b) (4) (A) Congress undertook "to sweep within its prohibition an entire pattern of industrial warfare deemed by Congress to be harmful to the public interest" and "to prohibit altogether or sharply curtail the use by labor organizations of certain economic weapons which they have heretofore freely employed." *Printing Specialties and Paper Converters Union v. LeBaron*, 171 F. 2d 331, 334 (C. A. 9); cf. *National Labor Relations Board v. Wine, Liquor & Distillery Workers Union, etc., Workers Union*, 178 F. 2d 584, 587 (C. A. 2). The immunity which a general contractor acquires by employing subcontractors is no different or greater than that which a manufacturer may acquire by obtaining his supplies from a non-union supplier of materials instead of producing these supplies himself with non-union labor. Congress clearly intended to insulate such a manufacturer from secondary strike pressure regardless of how onerous the consequences might be for a union. There is no reason to suppose that Congress meant to afford to unions engaged in the construction industry greater latitude than it accorded to other unions or that it intended to grant less protection to employers in the construction industry than in

other industries. The fact that the general contractor, like any other employer, has power to immunize himself from strike pressure directed against him by controlling the allocation of production does not invalidate the statutory distinction. Cf. *Gray v. Powell*, 314 U. S. 402, 413-414.<sup>36</sup>

D. THE APPLICATION OF SECTION 8 (b) (4) (A) IS NOT LIMITED TO SO-CALLED "PRODUCT BOYCOTTS".

The labor organizations also assert that in any event Section 8 (b) (4) (A) is designed to prohibit solely what is described as a product boycott, that is a strike or the inducement of a concerted refusal by employees to perform services, in order to compel their employer to cease using, selling, handling, or otherwise dealing in the products of an employer involved in a labor dispute; that the words "or cease doing business with any other person" refer to a refusal to handle the products of another employer; and that therefore Section 8 (b) (4) (A) has no application to a contractor and subcontractors because the former buys no products from the latter but merely "hires" or "employs" the services of the latter. The plain words of the

<sup>36</sup> Cf. *Giboney v. Empire Storage & Ice Co.*, 336 U. S. 490, where the Court upheld the constitutionality of limitations on picketing designed to force the ice company, in violation of Missouri's restraint of trade statute, to agree not to sell to non-union peddlers whom the union was seeking to organize. Although the economic position of the vendors was little different from that of employees, the ice company was afforded a measure of protection under the statute that it could not have enjoyed if, instead of selling ice to peddlers, it had used the services of employees to sell and distribute its ice.

statute preclude reading any such limitation into it. On the unions' interpretation, the phrase "or to cease doing business with any other person" (italics supplied) becomes mere surplusage. In the absence of countervailing considerations the word *or* "merits its normal disjunctive meaning, i.e., introductive of an alternative . . . ." *Gay Union Corporation v. Wallace*, 112 F. 2d 192, 196 (C. A. D. C.). The legislative history of the Act (Brief for the Board in No. 313, pp. 27-28), confirms the textual reading of Section 8 (b) (4) (A) and establishes that Congress intended the clauses in the Section introduced by the disjunctive "or" not to be limited so as to leave outside its scope a business relationship between two separate business enterprises which does not involve the sale, use, or handling of products.

**E. THE BOARD'S CONSTRUCTION AND APPLICATION OF SECTION 8 (b) (4) (A) IN COMMON SITUUS CASES HAS A REASONABLE BASIS IN LAW AND SHOULD BE SUSTAINED.**

As we have indicated, the problem in cases such as this, where a secondary employer "is harboring the situs of a dispute between a union and a primary employer,"<sup>37</sup> is to draw a line between the right of neutrals to be free from strike pressures, and the preservation of the union's right to engage in strike action against primary employers. "That task has been assigned primarily to the agency created by Congress to administer the Act." *Na-*

<sup>37</sup> *Moore Drydock, supra*, p. 35.

*tional Labor Relations Board v. Hearst Publications*, 322 U. S. 111, 130. Section 8 (b) (4) (A) does not "undertake the impossible task of specifying in precise and unmistakable language each incident which would constitute an unfair labor practice" under that section. The Act leaves to the Board, in the "empiric process of administration" (*Phelps Dodge Corporation v. National Labor Relations Board*, 313 U. S. 177, 194), the task of applying the section's "general prohibitory language in the light of the infinite combinations of events which might be charged as violative of its terms." *Republic Aviation Corporation v. National Labor Relations Board*, 324 U. S. 793, 798. And, "where the question is one of specific application of a broad statutory term in a proceeding in which the agency administering the statute must determine it initially, the reviewing court's function is limited. . . . The Board's determination . . . is to be accepted if it has 'warrant in the record' and a reasonable basis in law." *Hearst case, supra*, 131. The test on review is "reasonableness and not rightness."<sup>38</sup> Accord: *Gray v. Powell*, 314 U. S. 402, 412-413; *Rochester Telephone Corporation v. United States*, 307 U. S. 125, 146; *Unemployment Compensation Commission of Alaska v. Aragon*, 329 U. S. 143, 153-154; *Cardillo v. Liberty Mutual Co.*, 330 U. S. 469, 477-

<sup>38</sup> Davis, *Scope of Review of Federal Administrative Action*, 50 Col. L. Rev. 559, 572.

478; *Securities and Exchange Commission v. Chenery Corporation*, 332 U. S. 194, 207.

Pertinent here is the observation of this Court in *Addison v. Holly Hill Fruit Products, Inc.*, 322 U. S. 607, 611:

What was said in another connection is relevant here. "Looked at by itself without regard to the necessity behind it the line or point seems arbitrary. It might as well or nearly as well be a little more to one side or the other. But when it is seen that a line or point there must be, and that there is no mathematical or logical way of fixing it precisely, the decision of the [Administrator] must be accepted unless we can say that it is very wide of any reasonable mark." Mr. Justice Holmes, dissenting, in *Louisville Gas Co. v. Coleman*, 277 U. S. 32, 41.

## CONCLUSION

For the reasons stated, it is respectfully submitted that the judgment below should be reversed, and the Board's order enforced.

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FEBRUARY, 1951.

## APPENDIX

The relevant provisions of the Labor Management Relations Act, 1947 (61 Stat. 136, 29 U. S. C., Supp. III, 141, *et seq.*), are as follows:

\* \* \*  
 "SEC. 8. \* \* \*

\* \* \*  
 "(b). It shall be an unfair labor practice for a labor organization or its agents—  
 \* \* \*

"(4) to engage in, or to induce or encourage the employees of any employer to engage in, a strike or a concerted refusal in the course of their employment to use, manufacture, process, transport, or otherwise handle or work on any goods, articles, materials, or commodities or to perform any services, where an object thereof is: (A) forcing or requiring any employer or self-employed person to join any labor or employer organization or any employer or other person to cease using, selling, handling, transporting, or otherwise dealing in the products of any other producer, processor, or manufacturer, or to cease doing business with any other person; \* \* \*

